Supreme Court, U.S.
FILED

(1)

No. 94 934 NOV 22

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

WALTER F. LISEK,

Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN G. BAILEY
Counsel of Record
CALLIS, PAPA, HALE, JENSEN,
JACKSTADT, BAILEY & HALLORAN
Attorneys for Petitioner
1326 Niedringhaus Avenue
P.O. Box 1326
Granite City, Illinois 62040
(618) 452-1323

18 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a switchman injured while between the cars aligning a drawbar preparatory to his crew coupling the cars together must prove a defect in the coupling equipment in order to make a case submissible to the jury under the Federal Employers Liability Act for an alleged violation of the Safety Appliance Act.

II. Whether summary judgment was properly granted to the railroad for an injured employee's claim of injury resulting from the former's negligence.

III. Whether the District Court erred in striking the affidavit of Lisek where N&W only requested that portions be stricken and where the affidavit was based upon Lisek's personal observations while working as a switchman in N&W's Calumet yard.

PARTIES TO THE PROCEEDING

Plaintiff/Petitioner:

Walter F. Lisek, private citizen, who was on the date in question employed in the service of the defendant as a switchman at its Calumet Yard, Chicago, Illinois.

Defendant/Respondent:

Norfolk & Western Railway Company, now known as Norfolk Southern Railway, a subsidiary of the Norfolk Southern Corporation.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 2

Statement of the Case 5

A. The Incident 7

Reasons for Granting the Writ 9

I. Whether a switchman injured while between the cars aligning a drawbar preparatory to his crew coupling the cars together must prove a defect in the coupling equipment in order to make a case submissible to the jury under the Federal Employers Liability Act for an alleged violation of the Safety Appliance Act. 9

II. Whether summary judgment was properly granted to the railroad for an injured employee's claim of injury resulting from the former's negligence. ... 25

Contents

Page

III. Whether the District Court erred in striking the affidavit of Lisek where N&W only requested that portions be stricken and where the affidavit was based upon Lisek's personal observations while working as a switchman in N&W's Calumet yard. 29

Conclusion 30

TABLE OF CITATIONS

Cases Cited:

Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96 (1950) 10, 11, 12, 16

Atlantic City R. R. Co. v. Parker, 242 U.S. 56 (1916) ...16, 19, 20

B. & O. Railroad v. Baugh, 149 U.S. 368 (1892) 15

Buskirk v. Burlington Northern, Inc., 103 Ill. App. 3d 414, 431 N.E. 2d 410, *cert. denied*, 459 U.S. 910 (1982) ... 12, 30

Cazad v. Chesapeake & Ohio Ry. Co., 622 F.2d 72 (4th Cir. 1980) 26

Chicago, R. I. & P. Ry. Co. v. Ray, 67 Okla. 77, 168 Pac. 999 (1917) 21

Chicago, St. P., M. and O. Ry. Co. v. Muldowney, 130 F.2d 971 (8th Cir. 1942), *cert. denied*, 317 U.S. 700 (1943) 22, 23, 30

Contents

Page

Clark v. Kentucky & Indiana Term. R.R., 728 F.2d 307 (6th Cir. 1984) 11, 22, 23

Coray v. Southern Pacific Co., 335 U.S. 520 (1949) 10

Crane v. Cedar Rapids & Iowa City Ry. Co., 395 U.S. 164 (1969) 18

Davis v. City of Chicago, 841 F.2d 186 (7th Cir. 1988) ... 29

Davis v. Michigan Cent. R. Co., 294 Ill. 355, 128 N.E. 539 (1920) 21, 23

Donnelly v. Pennsylvania R. Co., 412 Ill. 115, 105 N.E. 2d 730, *cert. denied*, 344 U.S. 855 (1952) 21, 23, 30

Eschberger v. Consolidated Rail Corp., 174 A.D. 2d, 572 N.Y.S. 2d 539 (4 Dept. 1991), *cert. denied*, 112 S. Ct. 1778 (1992) 12, 23, 30

Finley v. So. Pac. Co., 179 Cal. App. 2d 424, 3 Cal. Rptr. 895 (2d Dist. 1960) 12

Geraghty v. Lehigh Valley R. Co., 70 F.2d 300 (2nd Cir. 1934) 22, 23

Hadley v. County of DuPage, 715 F.2d 1238 (7th Cir. 1983) 29

Hallada v. Great Northern Railway, 244 Minn. 81, 69 N.W. 2d 673 (1954), *cert. denied*, 350 U.S. 874 (1955) 12, 21, 30

Contents

Page

Hampton v. Des Moines & Cent. I. R. Co., 65 F.2d 899 (8th Cir. 1933) 22, 23

Johnson v. So. Pac. Co., 196 U.S. 1 (1904) 9, 14, 15, 21

Kansas City Southern Ry. Co. v. Cagle, 229 F.2d 12 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1955) 12, 22

Kavorkian v. CSX Transportation, Inc., 33 F.3d 570 (1994) 22, 23

Louisville & Nashville R. R. Co. v. Layton, 243 U.S. 617 (1917) 10, 14, 21

Maldonado v. Missouri Pacific Ry. Co., 798 F. 2d 764 (5th Cir. 1986) 12, 13, 14, 22

McGowan v. Denver & R. G. W. R. Co., 121 Utah 587, 244 P.2d 628 (1952), *cert. denied*, 344 U.S. 918 (1953) ..12, 21, 22

Metcalfe v. Atchison, Topeka & Santa Fe Ry. Co., 491 F.2d 892 (10th Cir. 1974) 15, 16

O'Donnell v. Elgin, Joliet and Eastern Ry. Co., 338 U.S. 394 (1949) 11, 12, 18, 20, 23

Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989) 29

Plouffe v. Burlington N., Inc., 224 Mont. 467, 730 P.2d 1148 (1986) 21

Contents

Page

Reed v. Philadelphia, Bethlehem & New England R. Co., 939 F.2d 128 (3rd Cir. 1991) 13, 14, 22, 23

San Antonio & A. P. Ry. Co. v. Wagner, 241 U.S. 476 (1916) 16, 17, 18, 19

Schaaf v. C. & O. Ry. Co., 113 Mich. App. 544, 317 N.W. 2d 679 (1982), *cert. denied*, 464 U.S. 848 (1983) 12, 30

Shenker v. Baltimore & O. R. Co., 374 U.S. 1 (1963) 25

St. Louis, Iron Mountain and Southern Railway Company v. Taylor, 210 U.S. 281 (1907) 14

United Transportation Union v. Lewis, 711 F.2d 233 (D.C. Cir. 1982) 13, 14, 15, 16, 22

Whetstine v. Gates Rubber Company, 895 F.2d 388 (7th Cir. 1990) 26

White v. Atchison, Topeka & Santa Fe Ry. Co., 244 S.W. 2d 26 (Mo. 1951) *cert. denied*, 343 U.S. 915 (1952) 12, 21, 23, 30

Statutes Cited:

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

Contents

	Page
28 U.S.C. § 1332	1
45 U.S.C. § 2	1, 2
45 U.S.C. § 51	1, 2, 3
45 U.S.C. § 53	4
45 U.S.C. § 54	4, 5
45 U.S.C. § 56	1
Rules Cited:	
Supreme Court Rule 10.1.(a)	1
Supreme Court Rule 10.1.(c)	1

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Seventh Circuit Dated August 24, 1994	1a
Appendix B — Opinion of the United States Court of Appeals for the Seventh Circuit Decided July 14, 1994	3a
Appendix C — Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, June 29, 1993	28a

OPINIONS BELOW

In the United States District Court for the Northern District of Illinois, the Honorable George M. Marovich granted summary judgment in favor of the respondent on June 28, 1993. (28a).

The case was appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the court below in a unanimous opinion authored by the Honorable Ilana Diamond Rovner. (3a).

STATEMENT OF JURISDICTION

Pursuant to the provisions of 28 U.S.C. § 1254, petitioner petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Certiorari should be granted pursuant to Supreme Court Rule 10.1.(a) because the decision below conflicts with prior decisions of United States courts of appeals and decisions of state courts of last resort, and pursuant to Rule 10.1.(c) because the decision below conflicts with prior decisions of this Court.

Jurisdiction in the court below was based upon 28 U.S.C. § 1291, wherein petitioner appealed the grant of summary judgment against him on all (both) counts of his complaint. Jurisdiction in the United States District Court for the Northern District of Illinois arose pursuant to the provisions of 45 U.S.C. § 56 for resolution of separate counts for personal injuries received on one occasion wherein petitioner alleged that respondent was guilty of negligence under the Federal Employers Liability Act (Count I), 45 U.S.C. § 51 and violated the Safety Appliance Act (Count II), 45 U.S.C. § 2. There was also diversity of citizenship under 28 U.S.C. § 1331 and § 1332, since respondent was incorporated and maintained its principal place of business in the State of Virginia, and petitioner was a citizen and resident of the State of Illinois. The amount in controversy exceeded $50,000.

The District Court for the Northern District of Illinois granted summary judgment to respondent on June 28, 1993. (28a). The Court of Appeals for the Seventh Circuit affirmed this decision on July 14, 1994. (3a). Petition for Rehearing was denied on August 24, 1994. (2a).

STATUTES INVOLVED

Safety Appliance Act, 45 U.S.C. § 2.

> **Automatic Couplers**
>
> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> (As amended June 22, 1988, Pub.L. 100-342, § 3(1)(B), 102 Stat. 630)

45 U.S.C. § 51.

> **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined.**
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of

Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404)

45 U.S.C. § 53.

Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

45 U.S.C., § 54.

Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment

> in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.
>
> (Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404)

STATEMENT OF THE CASE

Walter Lisek was a switchman for the N&W employed in its Calumet Yard on the south side of Chicago, Illinois. (Lisek, C-134 to 136) (Williams G-9). During the course of his duties on August 5, 1989, his crew was assigned the task of "making up" a train on tracks 18 and 19 of the yard. (C-141,142) (Csepiga E-12,13) (Rogers, H-7,8). This assignment included checking the position of the drawbar and the knuckle which, as a unit with other parts are called a coupler. If a drawbar is not aligned to the center its knuckle will not mate with its opposite on the car adjacent to it even when they are brought together with sufficient force and momentum. (C-170, 171) (F-36 to 38) (Madsen, I-58).

The tracks in the Calumet Yard run roughly north and south in geographic designation, but in railroad lexicon they are referred to as running east and west. The geographic southern end of the yard is the railroad eastern end of the yard; geographic north is railroad west. (G-20, 21) (I-56 to 58).

The Calumet Yard is a "flat switchyard", with a bowl

configuration. (E-51, 52) (G-49 to 52) (I-70 to 71). In such a yard, switching operations are performed from a "lead" track onto numbered "assignment," "yard" or "switch" tracks, or vice-versa. (C-137, 138) (E-45) (I-70, 71). The assignment tracks are lower in the middle than at the switches leading into them at either end. (E-51, 52) (G-49 to 52) For purposes of this brief, a "train" is a string of connected rail cars which are further connected to one or more locomotives. Locomotives are sometimes referred to as "power units," "the power," the "engine consist," or "the consist." A "cut of cars" is a string of cars which may or may not all be connected one to the other, but all of which occupy the same track.

Lisek worked on a yard switching crew which was assigned the task of connecting the cars in track 18 with those in track 19. (C-141, 142) (I-15). The cars in Tracks 18 and 19 were placed in the tracks by persons undetermined at the time of the entry of the Order appealed from, but there is no evidence that anyone other than N&W employees would have switched the cars into the respective tracks.

A cut of cars is disconnected from a train and placed in an assignment track by one of the crew lifting the pin on a car. This opens the knuckle on the car with the lifted pin and releases the car to which it was connected, and all cars connected to the released car. (E-46, 63-64) (G-49, 50). These cars roll from the lead into a yard track. (E-46) (G-50) The cars are separated while they are moving to provide momentum to the cars being cut loose. (E-63, 64) (G-42, 43, 50). The crew member lifts the pin on straight track because letting go of the cars on curved track will slue (push to one side) the drawbar. (E-44, 45, 46, 63, 64). After the cut of cars is released and enters the yard track, the imparted momentum causes, and the bowl configuration of the Calumet Yard permits, the cut of cars to roll freely until they contact another cut of cars, (I-71) (Memorandum Opinion, 29a) or until

they encounter the upslope or the switch at the other end of the yard track. (G-52) (I-70, 71). Once placed in yard tracks 1 through 30, handbrakes are not set on the cars in the cut. (E-72).

Pulling the pin during the switching movement does not require going between the cars as the pin lever is located on the side of the car, near the end where the knuckle is to be opened. The knuckle is the outermost extension at either end of the car and is attached to a drawbar which rests upon and within a slot referred to as the carrier iron. The drawbar is designed to pivot in the horizontal plane upon a point behind the carrier iron. (Rogers, H-17) Generally, the forward end of a car is designated the "A" end, and the rear is the "B" (brake) end. The coupling equipment is essentially the same at either end of the car.

A. The Incident

On August 5, 1989, the crew began their work sometime between 7:00 and 8:00 a.m. (C-140, 141) (E-11) (H-7). Lisek volunteered for the assignment of walking the tracks to inspect the track, cars and equipment. He observed a drawbar on the western end of a flat-bed trailer car on Track 19 which was slued (misaligned) so far to the (railroad) north as to be incapable of automatically coupling by impact with the coupler of the car next to the west. (C-159, 160, 170, 172 to 175) (I-56 to 58; Exhibit #3 of Madsen). Lisek placed his left foot over the northern rail of track 19 and pushed the drawbar to the south with his hands. (C-174, 175, 176). The drawbar moved more freely than Lisek anticipated, he lost his footing and struck his left knee on a tie between the rails. (C-174, 175). The accident occurred about 11:30 a.m. (C-140, 141).

That afternoon, Yardmaster Dennis Madsen, Trainmaster William Anna, and Superintendent Dennis Williams went to the scene. (I-33). On the same afternoon, Madsen assigned two car

maintenance workers, Polisczuk and Heintz, to perform a mechanical inspection of the drawbar in question. They made no notation, nor would they in the ordinary course of affairs, of the presence or quantity of grease on the carrier iron. (F-12, 17). Polisczuk did not recall whether the car was coupled to another, but he stated that he tried to check the movement of the drawbar, which requires the unit to be uncoupled. (F12, 13). Madsen contradicted Polisczuk in that he recalled that the car was coupled to another, and that they did not test the drawbar. (I-36). Williams recalled that the car was not coupled, (G-22) that the drawbar was centered (G-16) and that when they did test the drawbar, it took some effort to move it. (G-19).

Williams recalled that there was no oil on a cross-tie near where Lisek stated he fell, (G-13, 14) though there may have been between the subject car and the next car east. (G-21, 22). Madsen testified severally: that there was no oil spot within three to four car lengths either direction of the area where Lisek fell (I-44); that there was a fresh oil spot on the cross tie within the track and near the north rail in the area where Lisek fell (I-38, 42, 43, 59, 78, 79; Exhibit #3, p. 3); that he photographed an oil spot under the car to which the subject car was coupled (I-38, 40, 41); that there was an oil spot within three and one-half car lengths of an oil stack in the area where the subject car was, and that there was oil in the area of the stack (I-38, 42); and that there was oil in the vicinity of the accident near the north rail. (I-59, 78, 79; Exhibit #3, p. 3). Madsen stated that he noticed oil, or some dark, greasy substance, on Lisek's pants at his left knee when he first saw him in the crew shanty, (I-17) but did not notice anything on the soles of his boots. (I-58, 59). Lisek walked from the scene of the accident to the crew shanty. (C-184 to 186).

Lisek received his first medical treatment at the Hammond Clinic, where he was examined and released with orders to see his own doctor. Lisek has since been seen by several doctors and has

had three arthroscopic procedures performed separately by two orthopedic surgeons (Smith and Reider) for the repair of torn ligaments of the left knee and removal of a Baker's cyst. He also developed an infection following the second surgery by Smith, which also required hospitalization.

REASONS FOR GRANTING THE WRIT

I.

WHETHER A SWITCHMAN INJURED WHILE BETWEEN THE CARS ALIGNING A DRAWBAR PREPARATORY TO HIS CREW COUPLING THE CARS TOGETHER MUST PROVE A DEFECT IN THE COUPLING EQUIPMENT IN ORDER TO MAKE A CASE SUBMISSIBLE TO THE JURY UNDER THE FEDERAL EMPLOYERS LIABILITY ACT FOR AN ALLEGED VIOLATION OF THE SAFETY APPLIANCE ACT.

The decision by the Seventh Circuit in this case seriously and erroneously undermines protection for rail workers which has existed since the beginning of this century. The decision is at odds with those rendered by other federal courts of appeal, as well as state supreme and appellate courts, and should be reviewed by this Court.

The Safety Appliance Act is a broad remedial statute designed by Congress to correct the evil of coupling in the rail industry, which had theretofore required that switchmen be between the cars during the process. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 13-22 (1904).[1] Even where the worker was not

---

1. "The point was that the railroad companies should be compelled, (Cont'd)

engaged in coupling or uncoupling, the Act's absolute liability is imposed if the failure of the coupling device is the cause of the injury. *Louisville & Nashville R.R. Co. v. Layton*, 243 U.S. 617, 621 (1916); *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949).

In the decision upon which the writ of certiorari is sought, the Court of Appeals for the Seventh Circuit held that Walter F. Lisek was, as a matter of law, entitled to no relief for injuries he suffered in aligning a drawbar so far out of alignment that it would not couple with the car adjacent to it unless he stepped between the cars and manually aligned the drawbar. The court's rationale for this decision is that the drawbar may have misaligned due to several non-negligent or non-defective reasons, and that it is therefore incumbent upon the rail worker to manually place the drawbar in such a position that a coupling may be attempted. Should the device then fail to couple with the device of the car adjacent to it, he may recover. (16a).

The court below advised that its decision is an extension of *dicta* in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950), that "if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened', the railroad had a good defense." 339 U.S. 99. The language primarily relied upon below immediately precedes the quoted language: "Of course this assumes that the coupler was placed in a position to operate on impact." *Id.* The Seventh Circuit discusses, referencing the decision of her sister court,

---

(Cont'd)
respectively to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars." 196 U.S. at 16-17. "The essential degree of uniformity was secured by providing that the couplings, must couple automatically by impact without the necessity of men going between the ends of the cars." 196 U.S. at 20. The Act forbade the presence of men between the cars during coupling and uncoupling. 196 U.S. at 18-19.

Clark v. Kentucky & Indiana Term. R.R., 728 F.2d 307 at 312-3, the inherent differences between stepping between the cars to move a misaligned drawbar and lifting the pin lift lever at the edge of the car in order to open the knuckle. However, it does not resolve the issue by reference to the statutory language of the Safety Appliance Act which forbids the placement of men between the cars to effect a coupling. The Seventh Circuit concludes, after an overview of the decisions of fellow Courts of Appeals, that this Court's requirement in *Affolder*, that couplers be in an open position, means that *drawbars* must be aligned by switchmen. This is so even though it requires them to position themselves immediately behind a car and no device exists in the rail industry which enables drawbar alignment from outside the cars as is possible with opening the knuckle.[2] The *Affolder dicta* has not been extended by this Court, nor further examined. *Affolder* is this Court's last pronouncement on Section Two of the SAA.

The decision of the court below subverts this Court's holding in *O'Donnell v. Elgin, Joliet and Eastern Ry. Co.*, 338 U.S. 384 (1949)[3], in which it was held that evidence of defect added nothing to a claim under the SAA, 338 U.S. at 393, for it was the failure of the equipment to perform as Congress mandated which was violative of the Act. 338 U.S. at 390. "For reasons set forth at length in our books, the Court held that a failure of equipment to

---

2. It should further be noted that switchmen are not afforded the protection of blue flags, devices placed upon switch markers by carmen advising all that the track so marked is closed to all traffic. In former days, prior to work force reductions, the work of aligning drawbars was that of carmen under blue flag protection. Switchmen who align drawbars are thus at the mercy of their fellow crews and the assignments given those crews by management.

3. Which reversed a decision of the Court of Appeals for the Seventh Circuit.

perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability — a liability that cannot be escaped by proof of care or diligence." *Ibid.* (citations omitted). "These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.' *Brady v. Terminal Railroad Ass'n of St. Louis*, 303 U.S. 10, 15." 338 U.S. at 390-1.

Until the case of *Maldonado v. Missouri Pacific Ry. Co.*, 798 F. 2d 764 (5th Cir. 1986), the railroads' many attempts to extend the *Affolder dicta* to a requirement that the switchman align the drawbar before the Act could be violated came to naught. *See White v. Atchison, Topeka & Santa Fe Railway*, 244 S.W. 2d 26 (Mo. 1951), *cert. denied*, 343 U.S. 915 (1952); *McGowan v. Denver & R. G. W. R. Co.*, 121 Utah 587, 592-3, 598-603, 244 P.2d 628, 631, 634-6 (1952), *cert. denied*, 344 U.S. 918 (1952); *Donnelly v. Pennsylvania R. Co.*, 412 Ill. 115, 116-122, 105 N.E. 2d 730, 731-734, *cert. denied*, 344 U.S. 855 (1952); *Hallada v. Great Northern Railway*, 244 Minn. 81, 87, 69 N.W. 2d 673, 680-1 (1954), *cert. denied*, 350 U.S. 874 (1955); *Kansas City Southern Ry. Co. v. Cagle*, 229 F.2d 12, 14-5 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1955); *Finley v. So. Pac. Co.*, 179 Cal. App. 2d 424, 432-3, 3 Cal .Rptr. 895, 899 (2d Dist. 1960); *Buskirk v. Burlington Northern, Inc.*, 103 Ill. App. 3d 414, 431 N.E. 2d 410, 412, *cert. denied*, 459 U.S. 910 (1982); *Schaaf v. C. & O. Ry. Co.*, 113 Mich. App. 544, 317 N.W. 2d 679, 681 (1982), *cert. denied*, 464 U.S. 848 (1983); and *Eschberger v. Consolidated Rail Corp.*, 174 A.D.2d, 572 N.Y.S. 2d 539 (4 Dept. 1991), *cert. denied*, 112 S. Ct. 1778 (1992). In *dicta*, the *Maldonado* court stated that there may be a defense available to the railroad if it can prove misalignment of the drawbar as the cause of the failure to couple, but since the defendant produced no such evidence the

Court did not reach the issue. 798 F.2d at 768-9. The evidence in *Maldonado* indicated that the drawbar was aligned and the knuckle open prior to an impact which failed to result in coupling.

This decision was followed by that of *Reed v. Philadelphia, Bethlehem & New England R. Co.*, 939 F.2d 128 (3rd Cir. 1991), which approved the following jury instruction: "The defendant must present evidence to show that the misalignment did not occur because of equipment failure. In other words, the defendant has to establish a separate cause for failure to couple, other than equipment failure." 939 F.2d at 132. The *Reed* court engaged in a lengthy analysis, primarily relying upon *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1982), for its holding that the given instruction would allow the defendant to explain the accident, which occurred when the plaintiff claimed he had to step between the cars to open an allegedly defective knuckle. The matter was sent back for a retrial due to the improper argument of counsel for the railroad upon a collateral source issue. 939 F.2d at 132-4.

The plaintiff in *Reed* prevailed upon the evidence at the retrial. 1992 W.L. 17762 (E.D. Pa. 1992) The case was appealed upon the railroad's contention that it should be able to introduce evidence of and make argument upon the plaintiff having received Railroad Retirement Board disability benefits, notwithstanding the previous holding of the Third Circuit that such argument was of itself reversible error justifying the initial remand. 939 F.2d 132-4. The lower court's memorandum opinion after trial sets forth the arguments of the railroad, and there is no mention of drawbar misalignment. The Third Circuit summarily denied the appeal, 980 F.2d 724, and the petition for Writ of Certiorari was denied by this Court at 113 S. Ct. 1584 (1993).[4]

---

4. The Seventh Circuit identifies, at page nine of its opinion (12a), the original Third Circuit opinion as the one which this Court denied certiorari (Cont'd)

The Seventh Circuit, in its instant opinion, has taken *Maldonado*, *Lewis*, and *Reed*, and from them created a bar to recovery under the Safety Appliance Act for the rail employee assigned to prepare tracks for coupling who is injured while engaged in aligning a drawbar so far out of alignment that it will, if left in its position, not couple automatically upon impact without the necessity of men going between the cars. The decision below ignores the admonitions of this Court that the SAA is a broad remedial act intended to protect the worker and to place the burden of his injury upon the entity able to spread the consequences of his injury, *See St. Louis, Iron Mountain and Southern Railway Company v. Taylor*, 210 U.S. 281, 295-6 (1907); *Johnson v. So. Pac. Co.*, 196 U.S. 1, 17-21 (1904); and *Louisville & Nashville R. R. Co. v. Layton*, 243 U.S. 617, 621 (1917). By its ruling the Seventh Circuit has returned us to the days prior to the passage of the Safety Appliance Act; it now approves a railroad practice requiring workers to go between cars to effect a coupling.

The Seventh Circuit relies upon the *Lewis* rationale that since, after the cars are coupled and the carmen go between the cars and make up the air connections, the the SAA did not proscribe all activities of men going between the cars. (11a). Any analogy between air connection and drawbar alignment before coupling fails because air connection is possible only *after* coupling. Does this act of Congress permit a procedure which requires the air coupling to be made during coupling? Surely the answer must be, "No. No. A thousand times, no."

Although pointed out to the Seventh Circuit by this petitioner, that court chose to overlook the fact that this Court, in

---

(Cont'd)
upon, but that is not the case. It was the summary opinion after the trial at which petitioner prevailed for which the writ was denied.

its first pronouncement upon the Act[5], had examined the legislative history and determined that:

> * * * [t]he object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars, and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

196 U.S. at 16-7.

The Seventh Circuit reasoned that the SAA is an equipment, not an operations, statute, and that since the railroads had not in the hundred years of the Act's existence created devices which would center drawbars the Act must not have required this. (19a). The court made this statement on a record devoid of any evidence of the effort on the part of this or any other railroad to create devices which would center drawbars other than as reported in other decisions. No offer was made by the railroad, nor is there evidence offered in *Lewis*, that such devices are an impossibility. Rather, the *Lewis* court concluded, referencing testimony set forth in footnote two of *Metcalfe v. Atchison, Topeka and Santa*

---

5. The first mention by this Court of the SAA appears in *B. & O. Railroad v. Baugh*, 149 U.S. 368, 378 (1892), but the Act is not the central point of the case.

Fe Railway Co., 491 F.2d 892, 896 (10th Cir. 1974), that the devices remain in the experimental stage. 711 F.2d at 235 (note 5) and 251 (note 39). On the record before this Court[6], it is not unwise to conclude that centering devices on drawbars are not at the top of the research priority lists of this or any other rail carrier. Inventor's ingenuity has known no bounds when applied to a problem, but there is here a paucity of evidence as to the manner and methods of the problem solving. That lack of evidence should not inure to the benefit of the party whose duty it is to provide compliant equipment, particularly in a case where that party requests summary judgment be entered in its favor.

In its opinion, the Seventh Circuit makes no reference to two cases of this Court which are authoritative in this matter: *San Antonio & A. P. Ry. Co. v. Wagner*, 241 U.S. 476 (1916) and *Atlantic City R. R. Co. v. Parker*, 242 U.S. 56 (1916). Both cases were cited by petitioner below, but the court focused upon appellate decisions following *Affolder* in time.

In *Wagner*, the plaintiff, a brakeman, was assigned the task of riding the end of a locomotive which was to be coupled to a standing car. The couplers met on the first instance, but no coupling was made. Plaintiff signalled a stop and adjusted the knuckle and pin on the boxcar. He gave the engineer a back-up signal and got back on the footboard of the engine. He then noticed that the drawhead on the engine was shifted way over to his side, so he reached out with his left foot to straighten it and his right foot slipped on the wet footboard. His left foot was crushed.

The brakeman stated that the engine drawhead was properly aligned the first time, and the only thing which caused the failure to couple was that the pin on the boxcar did not drop. He gave his

---

6. Wherein the centering devices employed are discussed only in the cases cited by the parties, and not within the evidence before the trial court.

opinion that when couplers come together and do not couple, there is something wrong in one or the other coupler. A witness called by the railroad mirrored this testimony. 241 U.S. at 479-80. "The trial court instructed the jury that if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars, and by reason of this and as a proximate result of it plaintiff received his injuries, the verdict should be in his favor, otherwise in favor of defendant, and that the burden of proof was upon plaintiff to establish his case by a preponderance of the evidence." 241 U.S. at 480.

> It is insisted that neither the original Act nor the amendment precludes adjustment of the coupler prior to or at the time of impact, or treats a drawbar out of alignment as a defect in the automatic coupler, or as evidence that the cars are not equipped with couplers measuring up to the statutory standard. The evidence of bad repair in the automatic equipment was not confined to the fact that the coupling-pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact, together with the fact that the draw-bar on the engine was so far out of line as to require adjustment in preparation for the second impact, and the opinion evidence, being sufficient to sustain a finding that the equipment was defective. **The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided upon the engine as upon the car,**

> **and that there was none upon the engine.**
> * * *
>
> * * * As was stated in *Tex. & Pac. Ry. v. Rigsby, ante*, pp. 33, 39,— 'A disregard of the command of the statute [Safety Appliance Act] is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied.' If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U.S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employer's Liability Act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called as negligence *per se*.

241 U.S. 483-4. (Italics in original, bold emphasis added).

Since the decision in *Wagner*, this Court has broadened its interpretation of the Act: *O'Donnell* relieved the plaintiff of the burden of proving a defect, requiring only a showing that the device failed to function as mandated, 338 U.S. at 390, 393; *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969), held that common law notions of proximate causation had no place in the Act, but that the worker may recover upon showing that the violation played any part, no matter how small, in the injury sustained. *Wagner* is instructive and controlling where it reserves for the jury the question whether a drawbar so far out of alignment as to require manual intercar alignment is

violative of the Act. Moreover, a jury may reasonably find that such misalignment is a violation of the Act.[7] Nor is a jury incapable of an opposite conclusion. By a narrow construction of the Act the petitioner herein has thus far been barred from an opportunity to have a jury hear his case and make the decision which is eminently theirs.

Atlantic City R. R. Co. v. Parker, 242 U.S. 56 (1916) even more closely mirrors this case at bar. The railroad's primary defense to the jury's verdict was that the Safety Appliance Act does not apply to coupling made on a curve because no device exists which can align the drawbar from outside the car. Parker was injured when, after a failed coupling, he noticed that the drawhead on the car was not in line with that of the engine. He reached in to straighten it and was caught.[8] The railroad contended that there was no showing of defect in the equipment or of negligence on its part, and that the equipment was the best which could be supplied. The Court addressed that argument, stating at 242 U.S. 56, 57:

> If there was evidence that the railroad failed to furnish such 'couplers coupling automatically by impact' as the statute requires (*Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18, 19), nothing else needs to be

---

7. *Wagner* refers to the existence of a defect. May we not describe it as an insufficiency? That is, while the cars will couple if the drawbars are aligned, the system existing on the car in question was insufficient under the Act for it provided no means of aligning the drawbar from outside the car, as with the missing lever on the engine referenced in *Wagner.*

8. The Court's opinion gives no greater facts, but the defendant asserted that plaintiff assumed the risk by putting his hand in while the engine backed under signal. It appears that the plaintiff stood on the ground near the coupler of the car.

> considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated that the railroad had not fully complied with the law. [Citations omitted].

242 U.S. at 59.

In the instant matter there is no dispute that the track was level and straight, nor that the drawbar needed to be aligned in order for a coupling to occur. The courts below focus on the absence of proof of a defect by petitioner. Petitioner need not prove a defect, only that the device as furnished would not automatically couple on impact. *O'Donnell, supra* at 11. It then becomes the job of the jury to test whether the device was such as was mandated by Congress, and they may be warranted in finding either way. Although the Seventh Circuit affirms that the device as it was seen by petitioner was incapable of coupling with another, that court has added a duty upon switchmen which did not exist heretofore, and has thereby deprived him of his right to a trial by jury.

The Seventh Circuit says that since non-defective equipment may by non-negligent means become misaligned it is incumbent on the switchman who encounters a misaligned drawbar to first align it before there can be any violation of the Act. This is contrary to the decisions of this Court. It is not the worker who has the duty of making the device compliant with the law, it is the railroad. *Johnson, supra; Layton, supra* at 9. The decision of the Seventh Circuit places switchmen into the zone of danger which the SAA sought to cure, and it moreover misapplies the law of summary judgment to the facts of the matter for it views facts favorably to the movant, not the opponent.

Every state supreme court which has considered the issue whether a misaligned drawbar may be a violation of the Safety Appliance Act has upheld jury verdicts against the railroad or granted summary judgment to the injured worker. *See Davis v. Michigan Cent. R. Co.*, 294 Ill. 355, 128 N.E. 539 (1920); *Chicago, R. I. & P. Ry. Co. v. Ray*, 67 Okla. 77, 78-9, 168 Pac. 999, (1917); *Donnelly v. Pennsylvania R. Co.*, 412 Ill. 115, 105 N.E. 2d 730, *cert. denied*, 344 U.S. 855 (1952); *Hallada v. Great Northern Ry.*, 244 Minn. 81, 83-90, 69 N.W. 2d 673, 678-82 (1954), *cert. denied*, 350 U.S. 874 (1955); *McGowan v. Denver & R. G. W. R. Co.*, 121 Utah 587, 592-603, 244 P.2d 628, 631-36 (1952), *cert. denied*, 344 U.S. 918 (1953); *Plouffe v. Burlington N., Inc.*, 224 Mont. 467, 476, 730 P.2d 1148, 1154-5 (1986); *White v. Atchison, Topeka & Santa Fe Ry. Co.*, 244 S.W. 2d 26, 28-30 (Mo. 1951), *cert. denied*, 343 U.S. 915 (1952). No state appellate court holds otherwise.[9]

In cases where the worker was injured during the process of aligning the drawbar so that a coupling could take place, the United States Courts of Appeals have uniformly held that the misalignment alone was sufficient evidence for a jury to find a

---

9. The Seventh Circuit lists a sampling of the appellate cases at 10a - 11a.

violation of the Safety Appliance Act so that the railroad was liable to its worker in damages. *See Kansas City Southern Ry. Co. v. Cagle*, 229 F.2d 12, 14-5 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1955); *Clark v. Kentucky & Indiana Term. R.R.*, 728 F.2d 307 (6th Cir. 1984); *Geraghty v. Lehigh Valley R. Co.*, 70 F.2d 300 (2nd Cir. 1934); *Hampton v. Des Moines & Cent. I. R. Co.*, 65 F.2d 899 (8th Cir. 1933); *Metcalfe v. Atchison, Topeka & Santa Fe Ry. Co.*, 491 F.2d 892 (10th Cir. 1974); *Chicago, St. P., M. and O. Ry. Co. v. Muldowney*, 130 F.2d 971 (8th Cir. 1942), *cert. denied*, 317 U.S. 700 (1943).[10] *Lewis, Maldonado,* and *Reed* do not address the matter at hand except in *dicta*; moreover, *Lewis* was not an injury case but an action requesting prohibition of the use of a coupling hook in one of the CSX Transportation Company's hump yards.[11] At most, the latter three cases stand for no proposition beyond that respondent may have a defense to the petitioner's claim that the Act was violated if it can prove that the

---

10. In a case decided after the Seventh Circuit's decision, the Sixth Circuit reversed and remanded a plaintiff's verdict for failure to instruct the jury that the railroad is not liable for a Safety Appliance Act violation if it can persuade a jury that the failure to couple was not due to equipment failure. *Kavorkian v. CSX Transportation, Inc.*, 33 F.3d 570 (1994). The plaintiff was injured when two couplers bypassed, and he thereafter strained his back while trying to align one of the drawbars to the other. The court opined that the *Clark* court based its opinion upon evidence of a defect in the coupling equipment. A reader of the opinion may reasonably conclude that the *Clark* court reaches the same result by different paths, and which is *dicta* cannot be certainly ascertained.

11. In a hump yard, uncoupling is accomplished during movement by elevating one car on a hump so that its movement is slowed and a crewman can pull the pin. The switchmen were called upon to open the lead knuckle with the hook so that the car would couple with the string of cars on the classification track it was then sent to. Coupling would be accomplished much as it would on the bowl of the Calumet yards in the instant matter, gravity imparting the momentum needed for coupling on impact; uncoupling was accomplished here by lifting the pin lift lever at the side or end of the car during movement.

failure to couple was not due to equipment failure. While this violates the language earlier quoted from the *O'Donnell* opinion of this Court, it serves to support petitioner's position herein that summary judgment was entered against him in what is plainly a case where a question of fact remains to be resolved by a jury. The evidence adduced by the respondent cannot serve as an absolute bar here, but may, if admissible, serve to persuade a jury that the Act was not violated when it provided petitioner with a drawbar so far out of alignment that it could not couple with the car adjacent to it without the necessity of a man stepping between the cars to align the drawbar.

Because of the variety of holdings in the Circuit Courts of Appeals, some of which contradict the solid body of state supreme court decisions, a trainman who begins his run in Buffalo, New York bound for St. Louis, Missouri would be subjected to a wide variety of different legal requirements should he suffer an injury under circumstances similar to Lisek. If he were hurt in New York, *Geraghty*, 70 F.2d 300, would vouchsafe a recovery in the federal court, and *Eschberger v. Consolidated Rail Corp.*, 572 N.Y.S. 2d 539, *cert. denied*,112 S. Ct. 1778, would produce a similar result in the state court. If he were hurt in Pennsylvania or Ohio, *Reed*, 939 F.2d 128, and *Kavorkian*, 33 F.3d 570 (1994), might leave him with no recovery, although *Clark*, 728 F.2d 307 (6th Cir. 1984), would dictate that he recover. If the injury occurred in Illinois, he would file it in the state court as his recovery there, should the jury believe him, is assured under *Davis*, 128 N.E. 539, and *Donnelly*, 105 N.E. 2d 730, *cert. denied*, 344 U.S. 855. However, if he filed in federal court, under *Lisek*, he would have no remedy at all. And if he were hurt in Missouri, the state and federal courts agree that a misaligned drawbar, without more, is sufficient to violate the Act. *See Hampton*, 65 F.2d 899; *Muldowney*, 130 F.2d 971, *cert. denied*, 317 U.S. 700; and *White*, 244 S.W. 3d 26, *cert. denied*, 343 U.S. 915. Thus in two states, the worker plainly prevails, and in two

other states he may or may not win. This hypothetical could be extended in different geographic directions with like effect.

The perils of requiring rail workers to go inside the rails at the ends of cars in live rail yards in order to effectuate coupling are as present in today's rail industry as they were in 1893. Bodies were crushed, legs and feet were severed, and men's livelihoods, as well as their lives, were lost in furtherance of interstate railroading. Congress sought to halt the mayhem by enacting the SAA's mandate for automatic couplers in 1893. For these many years the SAA has been interpreted to prohibit the very activity that the Seventh Circuit now condones. The decision below with one fell stroke places men in danger *and* denies them recovery for injury from that danger. It has thus shifted the burden of injury from the railroad to the worker in one of the most perilous activities of the already too perilous railroading industry. This is contrary to the intent of Congress and should not stand.

Since occasional aligning of drawbars is still required by modern coupling equipment, and since it can only be accomplished by the presence of a man between the cars and the rails, the SAA should be applied uniformly to prohibit the practice all across the interstate industry. That uniformity is a matter of *stare decisis*, and the Seventh Circuit should be reversed and this matter remanded to the District Court for trial consistent with this Court's many holdings on the Safety Appliance Act.

II.

WHETHER SUMMARY JUDGMENT WAS PROPERLY GRANTED TO THE RAILROAD FOR AN INJURED EMPLOYEE'S CLAIM OF INJURY RESULTING FROM THE FORMER'S NEGLIGENCE.

In his Statement of Facts responding to the Statement of Facts provided by N&W, Lisek responded to the N&W's paragraph 29, in which the railroad claimed it had no control over how much others greased its drawbars, by stating that this was not a valid defense to a non-delegable duty. Lisek responded to paragraphs 66 and 67 by advising that, "Lisek believes that his injury could have been caused by a combination of both the drawbar moving more easily than anticipated and grease or some other foreign substance on the tie (Ex. C., p. 178-81, 188, 189)." Lisek further advised at paragraph 76, "Lisek had grease on his left knee (Ex. C., p. 181, Ex. I, p. 17, 58)." Lisek therefore did not waive the court's consideration of an excess of grease on the drawbar, nor of the presence of grease on the tie.

Moreover, the District Court's ruling and opinion as to the relative responsibilities of the railroad and Mr. Lisek shows a fundamental lack of understanding of a basic concept under the Federal Employers Liability Act. The District Court stated on page 8 of its ruling that, "Similarly, N&W had no responsibility for the grease on the drawbar itself. The fact that the bar moved more easily than Lisek expected is not N&W's fault, but Lisek's for failing to check the bar before he 'attacked' it. Further, Lisek admits that he did not look at where he placed his feet before he shoved the bar. Thus it is Lisek's own conduct that is the proximate cause of his injuries." The court's conclusion is contrary to the law in the FELA, where the railroad has a non-delegable duty to provide a safe place to work. *Shenker v. Baltimore & O. R. Co.*, 374 U.S. 1 (1963).

Further support for petitioner's contention that facts were made known to the District Court sufficient to avoid summary judgment appears in the District Court's opinion where it is stated, "In his deposition, Lisek testified that after he fell he saw an oil spot on the tie on which he chose to stand. The presence of oil on the rail is not, however, supported by anything other than Lisek's own testimony. . . . [T]he only grease found was on the knee of Lisek's pants leg." (34a). The court's finding corroborates Lisek's statement that there was grease on the tie, as there was grease on his pants leg.

While Lisek did not argue these points in his Response to the Motion for Summary Judgment, he did set forth these points in his Rule 12(n) Statement of Facts. These were, therefore, controverted facts giving rise to a question of fact for a jury's determination. The court below places upon petitioner an overwhelming burden to show what respondent knew or should have known in relation to the condition of its equipment and its tracks. The District Court mentioned that there was no reference to how the oil got on the track, which evidences a complete disregard of railroad operations. The most logical place that oil comes on a track is from a locomotive, and even if the oil had been placed by a trespasser, the railroad has a non-delegable duty to discover it. *Cazad v. Chesapeake & Ohio Ry. Co.*, 622 F.2d 72, 75 (4th Cir. 1980).

The Seventh Circuit, rather than focusing upon the opinion of the District Court, and further overlooking all of the matters brought to the District Court by the petitioner, chooses to focus only upon petitioner's argument in his Response to the Motion for Summary Judgment. As the standard of review is *de novo, Whetstine v. Gates Rubber Company*, 895 F.2d 388, 391-2 (7th Cir. 1990), this Court should examine the findings of the District Court in toto.

The Seventh Circuit rejected petitioner's allegations of proof in the form of deposition testimony which tended to show that drawbars become sloughed when cars are uncoupled on curves. It reasoned that this was not sufficient "proof" because there was no testimony that this was how this drawbar actually became sloughed. (24a, 25a). But a plaintiff has no better chance to prove with reasonable likelihood that an employee lifted this pin on a curve than the railroad does to prove that a misalignment of this drawbar was not due to a failure of its equipment. The court below sanctioned a situation where the railroad is permitted to argue that drawbar misalignment which results from employee negligence is not actionable under the Safety Appliance Act while not according the same privilege to the petitioner on the negligence count. This is certainly a reverse interpretation of the Federal Employers Liability Act and fundamentally unfair to the petitioner and other rail carriers.

The petitioner cited as a basis for a claim of facts in support of the negligence case the respondent's Statement of Facts, paragraphs 35, 36 and 37. Specifically, petitioner allowed that those statements by the respondent which make reference to items in the record, were further extensions of railroad negligence. The court ignored these assertions in ruling on the negligence claim, essentially holding that the petitioner cannot use or allow facts cited by the defendant in his favor. In particular, respondent's Fact No. 37 states, "A drawbar can become sloughed due to the design of the track", unless we are to conclude that someone other than the railroad designed the railroad's track, this is a matter clearly known to respondent. Nowhere in the Federal or Local Rules of Civil Procedure is it stated that a Motion for Summary Judgment and the moving party's factual statement is a one-way street flowing only in the direction of the moving party, in this case the respondent. The District Court and the Seventh Circuit, in granting summary judgment on the negligence count, concluded that Lisek "failed

to offer a 'scintilla' of evidence." (26a). These admissions alone show the error of that conclusion.

The appellate court and the District Court overlooked the lack of a readily available club or other tool, and the differences in the forces an individual applies when utilizing a tool as opposed to using one's body. (25a, 26a, 32a). The concept that the failure to furnish a tool is sufficient evidence of negligence on the part of the railroad for a jury to find in favor of petitioner should be manifest, as tools are in common knowledge those devices which make any task easier than it would be without the provision of the tool. An activity which requires less effort is less likely to be injurious. This was argued, and ignored, by the District Court. The court below merely found that Lisek's failure to check the equipment was the sole proximate cause of his accident. While this may have been contributory negligence, the overgreased condition of the drawbar and the grease on the tie contributed to cause, in whole or in part, Lisek's injury. The District Court further states that the task was customarily performed by one person, whereas Lisek contended that there was at one time a rule which required two people, but that the rule was not generally enforced by management. (36a, Petitioner's Statement of Facts, ¶42). Surely these are matters which are better resolved by a jury.

The jealously guarded right to a jury trial for FELA claimants was disregarded by the District Court and by the Seventh Circuit. Important facts which were favorable to Walter Lisek's negligence claim were either not given their proper weight or ignored completely. Because his claims were not properly analyzed by either of the courts below, Lisek's Petition should be granted and reversal ordered with directions to place this matter before a jury for trial.

III.

WHETHER THE DISTRICT COURT ERRED IN STRIKING THE AFFIDAVIT OF LISEK WHERE N&W ONLY REQUESTED THAT PORTIONS BE STRICKEN AND WHERE THE AFFIDAVIT WAS BASED UPON LISEK'S PERSONAL OBSERVATIONS WHILE WORKING AS A SWITCHMAN IN N&W's CALUMET YARD.

N&W requested that the District Court strike the third and fourth paragraphs of the affidavit of Lisek. (Motion to Strike Affidavit). The court, in a cursory hearing, struck all of the affidavit, stating that it would rely upon Lisek's deposition. (Appendix on Appeal to Seventh Circuit, App.-10-12). The matters contained in the affidavit, and particularly the matters in paragraphs three and four, were not contained in the deposition, with the exception of the length of Lisek's employment as a switchman at the yard of N&W. Lisek's counsel did not ask any questions at Lisek's deposition. The matters contained in the affidavit were based upon Lisek's personal knowledge from observations while working, and were not such statements stricken as conclusory in *Hadley v. County of DuPage*, 715 F.2d 1238, 1243 (7th Cir. 1983); *Davis v. City of Chicago*, 841 F.2d 186, 188-9 (7th Cir. 1988) and *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989). Failure to consider the erroneously stricken portions of his affidavit denied Lisek the right to a jury trial. The Petition should be granted so that the matter can be reversed and put before a jury.

CONCLUSION

The decision of the Seventh Circuit is contrary to the previous decisions of this Court[12] regarding liability for violations of the Safety Applicance Act. The decision below is contrary to that of every state supreme and appellate court which has addressed the issue. If there is not a conflict among the United States courts of appeals, there is certainly great confusion leading to disparate results throughout the many states where the Act is to be applied.

Lisek presented sufficient facts for his FELA claim to be considered by a jury. Lisek's affidavit was based on personal knowledge and should not have been stricken from the record.

This petition should be granted in order to review and reverse the errors below so that this matter may be remanded for a trial by jury.

Respectfully submitted,

STEVEN G. BAILEY
Counsel of Record
CALLIS, PAPA, HALE, JENSEN, JACKSTADT, BAILEY & HALLORAN
Attorneys for Petitioner

---

12. By petitioner's count, this Court has also denied petitions for writ of certiorari in two cases from the United States courts of appeals (8th, *Muldowney*; 10th, *Cagle*), in four cases from state supreme courts (Missouri, *White;* Utah, *McGowan*; Illinois, *Donnelly*; and Minnesota, *Hallada*) and three state appellate courts (Illinois, *Bushirk*; Michigan, *Schaaf*; and New York, *Eschberger*) in cases holding that drawbar misalignment is not a defense, and moreover is the source of liability of the railroad to the injured employee. This Court has been consistent; there is no case with an opposite holding for which a petition for writ of certiorari has been denied.

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 24, 1994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 24, 1994

Before

Honorable William J. Bauer, Circuit Judge

Honorable Jesse E. Eschbach, Circuit Judge

Honorable Ilana Diamond Rovner, Circuit Judge

No. 93-2785

WALTER F. LISEK,

Plaintiff/Appellant,

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant/Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 90 C 6331

George M. Marovich
District Judge

Appendix A

ORDER

On consideration of the petition for rehearing filed by plaintiff/appellant on July 28, 1994, all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing be, and the same is, hereby DENIED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JULY 14, 1994

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-2785

WALTER F. LISEK,

Plaintiff-Appellant,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 6331 **George M. Marovich,** *Judge.*

ARGUED JANUARY 11, 1994 — DECIDED JULY 14, 1994

Before BAUER, ESCHBACH and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* After being injured while performing his duties as a switchman for Norfolk and Western Railway Company ("N&W"), Walter Lisek sued the company under the Federal Safety Appliance Act ("FSAA"), 45 U.S.C. §§ 2-43a, and the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60. Finding that even with all inferences in his favor Lisek had failed to establish a violation of either act, the district

court granted N&W's motion for summary judgment. Lisek appeals, and we affirm.

I. Background

Lisek was employed by N&W as a switchman in its Calumet yard in Chicago.[1] The switchman's duties include "making-up" trains by linking together otherwise separate cars. That task requires, as a preliminary matter, inspecting the cars' coupling mechanisms to see that they are properly positioned for coupling. Located at either end of each car, the coupling mechanism consists of a drawbar and knuckle that connects with its mate on

---

1. This factual summary is based on the parties' statements of uncontested facts, filed in compliance with the Northern District of Illinois' General Rule 12(m) and (n) and found at R. 41 and 47. In accordance with that rule, and consistent with Fed. R. Civ. P. 56(e), all facts contained in the movant's 12(m) statement and not controverted in the opponent's 12(n) statement are deemed admitted. The opponent must set out any additional facts that it believes create a factual issue in its 12(n) statement as well. *See Waldridge v. American Hoechst Corp.*, No. 92-3714, slip op. at 6 (7th Cir. May 16, 1994) ("district courts are not obliged . . . to scour the record looking for factual disputes") & 9 (12(n) statements are "roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own."). Here, in addition to his 12(n) statement and his memorandum of law, Lisek filed an unusual document entitled "Plaintiffs Response to Defendant's Motion for Summary Judgment on Counts I and II" ("Response"). Comprised of 15 numbered paragraphs, this document contains various factual and legal assertions and cites to affidavits and exhibits as well as to case law. Because this document in any event creates no factual dispute, we need not decide whether it properly should be considered as supplementary to Lisek's 12(n) statement, although we certainly would not encourage such filings in future cases.

Because we are reviewing N&W's summary judgment motion, we have resolved all factual disputes and made all factual inferences in Lisek's favor. Lisek's deposition, included in R. 41 as Exhibit C, is also cited.

the adjacent car. The drawbar rests on a pivot, which provides for lateral movement so that cars will not derail while rounding curves. Although coupling occurs "automatically" upon impact, the drawbars must be aligned and at least one of the knuckles must be open in order for the cars to connect. Thus, prior to coupling, the switchman must check the position of the couplers, aligning drawbars and opening knuckles when necessary. Because there is no automated means of centering misaligned drawbars,[2] this task is commonly performed manually by a switchman.

On August 5, 1989, Lisek walked between two adjacent tracks in the Calumet yard, numbers 18 and 19, simultaneously checking the cars on either side in preparation for coupling.[3] He came across a misaligned drawbar on Track 19 and went to straighten it. Preparing to move "a couple thousand pounds worth of steel . . . an inch at a time" a task that is accomplished with "a pushing, lifting motion," and "take[s] all the force of your body" he gripped the drawbar from below with his hands near his waist. (R. 41, Ex. C at 178-79.) He placed his left foot on a tie inside the rail, and his right foot outside of the rail. *(Id.* at 176-77.) When he began to push the drawbar, however, it moved with unexpected

2. Lisek asserts that there is experimental equipment available for this purpose, but does not contend that it is in common use. (*See* R. 47141.) Other courts have reached the same conclusion. *See, e.g., United Transp. Union v. Lewis,* 711 F.2d 233, 235 n.5 (D.C. Cir. 1983) ("After 90 years automatic *realigning* devices, as opposed to automatic *coupling* devices, are still in the experimental stage and have been installed on less than one percent of railroad cars." (emphasis in original)); *Metcalfe v. Atchison, Topeka and Santa Fe Ry. Co.,* 491 F.2d 892, 896 n.2 (10th Cir. 1974).

3. Although he apparently had been assigned only to check Track 18, Lisek simultaneously checked Track 19 on his own initiative in order to save time. (R. 41. Ex. C at 145.)

ease. Lisek lost his grip and his feet slipped out from under him. He hit his left knee on the ground, and landed in a prone position. (*Id.* at 179-81.) At that point he noticed a "wet foreign substance" on the tie, which he believed to be grease. (*Id.* at 182-83.) In retrospect, he was unsure whether the fall was caused by the unexpected acquiescence of the drawbar, the grease on the tie, or the two factors in combination. (*Id.* at 179-81,189.) In any event, the fall caused permanent injury to Lisek's knee and spawned this litigation.

II. FSAA Claim

A. The Law

Although the FSAA does not itself create a private right of action, employees who allege that they have been injured as a result of FSAA violations may sue under the FELA, 45 U.S.C. § 51. *See Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164,166 (1969). Because the railroad's duty under the FSAA is absolute, the employee must prove only that the statute was violated, and no showing of negligence is required. *Id.; Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 99 (1950). In other words, "a failure of equipment to perform as required by the [FSAA] is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence." *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949); *see also Affolder*, 339 U.S. at 99.[4]

---

4. Although both *Affolder* (339 U.S. at 99) and *O'Donnell* (338 U.S. at 390) speak in terms of proximate causation, *Crane* explained that the employee "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or part' from the railroad's violation of the Act." 395 U.S. at 166 (quoting 45 U.S.C. § 51).

Appendix B

Lisek's claim rests on an alleged violation of FSAA section 2, which provides:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. § 2. First enacted in 1893, section 2 was meant to address the safety risks associated with manual coupling, which had required workers to stand between cars as they moved together, sometimes at speeds of up to 12 miles per hour. *See United Transp. Union v. Lewis*, 711 F.2d 233, 247 n.34 (D.C. Cir. 1983).[5] The Supreme Court has held that the statutory phrase "without the necessity of men going between the ends of the cars" applies to coupling as well as to uncoupling. *Johnson v. S. Pacific Co.*, 196 U.S. 1, 18-19 (1904). To comply with the statute, then, equipment must enable workers to accomplish both tasks without going between cars. Lisek claims that N&W violated section 2 in that workers needed to go between cars to manually align drawbars before automatic coupling could occur.

Although the Supreme Court has not directly addressed the question of whether the need for manual intercar drawbar alignment violates section 2, it shed light on the issue in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96 (1950). In *Affolder*, a worker had been injured chasing after a runaway chain of cars, which had broken away after two cars had failed to couple on impact. Focusing on the question of whether the plaintiff could

---

5. For the history of section 2 see *Lewis*, 711 F.2d at 245-248. The section was most recently amended on June 22, 1988.

meet his burden by showing a failure to couple or whether he must also establish that the coupler was defective, the Court held that the former was sufficient. Thus, "the plaintiff did not have to show a 'bad' condition of the coupler" and "neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." *Id.* at 99; *see also Maldonado v. Missouri Pac. Ry. Co.*, 798 F.2d 764, 767 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). But the Court added this caveat:

> Of course this assumes that the coupler was placed in a position to operate on impact. Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened", the railroad had a good defense.

339 U.S. at 99. Reiterating that principle in his dissent, Justice Jackson wrote:

> Before a failure to couple establishes a defective coupler, it must be found that it was properly set so that it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not that of the device.

Id. at 101 (Jackson, J., dissenting).[6]

Although several circuit and state courts have considered whether the *Affolder* exception to absolute liability applies to misaligned drawbars as well as to unopened knuckles, they have

6. Justice Jackson disagreed that the jury instructions at issue were proper, but agreed with the majority's characterization of the law.

not reached consensus. Finding the two conditions distinguishable (without explaining why), the Tenth Circuit held in *Kansas City S. Ry. Co. v. Cagle*, 229 F.2d 12, 14-15 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1956), that a railroad was liable when cars failed to couple due to a misaligned drawbar, notwithstanding *Affolder's* holding regarding unopened knuckles. The court reaffirmed its position in *Metcalfe v. Atchison, Topeka and Santa Fe Ry. Co.*, 491 F.2d 892, 896-97 (10th Cir. 1974), although it did so without discussing *Affolder*.

The Sixth Circuit also found that misaligned drawbars are distinguishable from closed knuckles in *Clark v. Kentucky & Indiana Terminal R.R.*, 728 F.2d 307, 312 (6th Cir. 1984). It reached that conclusion for two reasons, both compelling. First, the court found as a factual matter that a drawbar could not be so far out of alignment as to impede coupling unless it was defective:

> A coupler typically has a lateral play of one to one and one-half inches on either side that permits movement of coupled cars around curves. But a coupler's lateral motion may be increased by wear. "[T]he customary play of an inch or a little more does not interfere with . . . coupling upon impact." But "[i]f the couplers are out of alignment beyond the normal play, the coupling will not make automatically even though both knuckles are opened." In contrast, a coupler knuckle is by design either open or closed. Unlike misalignment, the knuckle's position is not attributable to aging equipment.

Id. at 312-313 (citations omitted). Second, the court found that a

closed knuckle differed from a misaligned drawbar in that the former could be corrected without the necessity of workers going between cars, while the latter could not:

> As importantly, should both couplers be found in the closed position before an attempted coupling, a worker can open a knuckle by operation of the lift lever on the side of the railroad car. In order to correct a coupler so out-of-line that a successful coupling is impossible a railroad worker is required to step between the cars and make the adjustment.

Id. at 313. Thus, *Clark* reasoned, the manual opening of knuckles does not contravene section 2, while the manual alignment of drawbars, which requires workers to go between cars, violates the statutory requirement.

The state courts have also overwhelmingly held that a failure to couple due to drawbar misalignment constitutes a violation of the Act. *See, e.g., Finley v. S. Pac. Co.*, 3 Cal. Rptr. 895, 900-01 (Cal.Ct.App. 1960); *Pry v. Alton & S. Ry.*, 598 N.E.2d 484, 496, 500 (Ill.App. 1992); *Buskirk v. Burlington N., Inc.*, 431 N.E.2d 410, 412 (Ill.App.), *cert. denied*, 459 U.S. 910 (1982); *Schaaf v. Chesapeake & Ohio Ry. Co.*, 317 N.W.2d 679, 680-81 (Mich.App. 1982), *cert. denied*, 464 U.S. 848 (1983); *Hallada v. Great N. Ry.*, 69 N.W.2d 673, 680-81 (Minn.), *cert. denied*, 350 U.S. 874 (1955), *overruled in part on other grounds, Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 396-97 (Minn.1977); *White v. Atchison, Topeka & Santa Fe Ry.*, 244 S.W.2d 26, 29-30 (Mo. 1951), *cert. denied*, 343 U.S. 915 (1952); *Plouffe v. Burlington N., Inc.*, 730 P.2d 1148, 1154-55 (Mont. 1986); *Eschberger v.*

Consol. Rail Corp., 572 N.Y.S.2d 539, 540 (N.Y.App.Div. 1991), *cert. denied*, 112 S. Ct. 1778 (1992); *McGowan v. Denver & R. G. W. R. Co.*, 244 P.2d 628, 634 (Utah 1952), *cert. denied*, 344 U.S. 918 (1953).

But this view has not been unanimously adopted by the federal circuits. Although not directly on point, the decision of the District of Columbia Circuit in *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983) has been influential with courts that have adopted the contrary position. In *Lewis*, the court discussed whether the use of a metal hook device during the uncoupling process violates section 2 because its use requires a switchman to insert part of his body between cars. Based on an extensive review of the statute and its legislative history, the court concluded that the statute was meant to mandate the use of certain equipment, but not to regulate operating procedures. Although the statute requires the use of automatic couplers, it does not make unlawful any procedure that would involve going between cars.[7] *Id.* at 251. In other words, "the final phrase of section 2 is not an 'independent requirement' but is instead merely 'descriptive of the equipment required.' " *Id.* at 249 (quoting *United States v. Illinois Cent. R.R.*, 170 F. 542, 550 (6th Cir. 1909)).[8]

Relying on the *Lewis* equipment/procedure distinction, the

---

7. Indeed, the court noted, the FSAA requires the use of air brakes, which are manually connected by workers between cars after the couplers have engaged. The court also noted that even the use of cut-levers, the ends of which do not extend beyond the side of the car, requires switchmen to place their hands between cars. *Id.* at 245 & nn. 31-33.

8. *Lewis* did advert to the issue of drawbar misalignment and section 2 in two footnotes that we consider below. *See infra* nn. 14-15 and accompanying text.

Third Circuit held that a railroad could raise the defense of drawbar misalignment in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128,131-32 (3d Cir. 1991), *cert. denied*, 113 S. Ct. 1584 (1993). The court explained:

> We think the rationale of *Affolder*, which allows a defense of closed knuckles, applies equally to a situation where non-defective equipment is misaligned. In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act.

Id. at 132. At the same time, the court made clear that when raising this defense, the railroad bears the burden of showing that the misalignment was not caused by an equipment failure. Indeed, the Court approved a jury instruction that required the railroad "to establish a separate cause for failure to couple, other than equipment failure." *Id.*

The same requirement was adopted by the Fifth Circuit in *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764 (5th Cir. 1986). Without deciding whether or not a misaligned drawbar could ever be a defense to section 2 liability,[9] the court held that, if

---

9. Although it found ultimate resolution of the issue unnecessary in light of the railroad's failure to meet its burden, the court approved the *Lewis* equipment/procedure distinction and noted that it "suggests that drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the noncoupling does not reflect defective or failed equipment." 798 F.2d at 768.

it could, the railroad would have to produce evidence showing that the misalignment was not due to a failure or defect in the equipment:

> Evidence that the drawbars were misaligned so as to prevent coupling places a burden on the railroad to produce evidence tending to show a separate cause for the failure to couple. This is so because a failure to couple due to a deficiency in the equipment, such as a drawbar with more lateral play than is appropriate for normal operation, clearly amounts to a violation of the FSAA.

Id. at 768. Because the railroad had failed to advance such evidence, the court found that the district court had not erred when it instructed the jury that operating a car with its drawbar sufficiently out of line to prevent coupling amounted to an FSAA violation. *Id.* at 767-69.

Finally, although not relying on the *Affolder* paradigm or discussing the railroad's burden of proof, the Fourth Circuit recently agreed with Reed that "a simple misalignment" of non-defective couplers does not violate the FSAA. *Goedel v. Norfolk & W. Ry. Co.*, 13 F.3d 807, 812 (4th Cir. 1994).[10]

---

10. The FSAA issue was only indirectly relevant in *Goedel*. Because Goedel was not an employee of the railroad, his claim was based on state tort law rather than on FELA. Whether the FSAA had been violated was relevant because under West Virginia law a statutory violation would amount to prima facie evidence of negligence. *See id.* at 810. The court was therefore apparently able to avoid the complexities that have emerged from the other cases.

Appendix B

B. Lisek's Claim

Lisek's claim differs from that in many of these cases because his accident did not follow an unsuccessful attempt at coupling.[11] Instead, Lisek noticed the misaligned drawbar,

---

11. Lisek does not dispute the fact that his accident occurred prior to coupling the cars, which presumably would have ensued if not for Lisek's accident. His 12(n) statement does not assert that there was a pre-accident coupling attempt or otherwise controvert N&W's assertion that there had not been. That alone is of course enough for us to deem the fact admitted. *(See supra* n.1.) Lisek does attempt to cloud the issue, however, via this statement in his "Response":

> [T]he "bowl" design of the Calumet Yards, wherein the switches leading into track 19 are higher in elevation than the track between them, leads to a reasonable inference that the car in question would have rolled toward and contacted the first car in track 19, and they should have coupled on impact were it not for the failure of the automatic couplers to operate as mandated by Congress.

(R. 44 ¶ 5.) We need not consider what weight to give this "fact" (included as it is in Lisek's "Response," but not in his 12(n) statement) because the record is completely devoid of evidence suggesting that this is what happened on August 5, 1989. Indeed, in the portion of Lisek's deposition that is cited to support this assertion, he affirmatively denied knowing whether the cars on track 19 had been switched in a manner that would have resulted in coupling on the morning of August 5. (R. 42 Ex. C at 205-06.) The other deposition portions cited to support this proposition do not in any way pertain to it. Finally, Lisek's affidavit (R. 46, see *infra* n.20), the final document cited in support of this proposition, contains only a similar general and conclusory statement. In addition, Lisek has failed on appeal to contest the district court's factual finding that no coupling attempt had preceded the accident, even though it underlay the district court's sole reason for granting N&W's motion. That failure not only requires us to accept the district court's finding as a technical matter (based on the doctrine of waiver), but also persuades us that the court's factual finding was correct.

determined that it would prevent coupling, and went to straighten it in advance of the attempt. The district court found that a failed attempt at coupling was "an integral part of the proof of equipment failure under section 2," and that Lisek's failure to establish a preaccident impact was fatal to his claim. It therefore granted N&W's summary judgment motion.

We agree with the district court that the absence of a failed coupling attempt is significant because it is the failure to couple that triggers the railroad's absolute liability under section 2. *See, e.g., Affolder,* 339 U.S. at 98 ("the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance 'on the occasion in question.' ") & 99 ("the plaintiff did not have to show a 'bad' condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly 'in the switching operation was a violation of the Act. . . .' "). In other words, the Act requires automatic coupling equipment and the failure to couple creates the nearly irrebuttable presumption that the Act has been violated.

Whether the failure to couple is a necessary prerequisite to absolute liability in a misalignment case, however, depends on whether the *Affolder* defense is extended to include misalignment. If the *Affolder* defense is unavailable in misalignment cases, then the railroad is liable for all injuries resulting from misalignment, and the requirement of a pre-injury coupling attempt would be senseless. In other words, if *any* misalignment could trigger liability, then requiring that workers attempt coupling even though they know it will fail due to misalignment[12] would only encourage inefficient procedures on

12. Lisek, for example, testified that he could tell by looking whether a drawbar was misaligned to such an extent that coupling would not be possible. (Cont'd)

railyards and increase the risks to employee safety. This may explain why those courts that have found all misalignments to trigger liability have not required a pre-injury coupling attempt. *See, e.g., Clark,* 728 F.2d at 312; *Chicago, St. P., M. and O. Ry. Co. v. Muldowney,* 130 F.2d 971, 975-76 (8th Cir.), *cert. denied,* 317 U.S. 700 (1942).

If, on the other hand, the *Affolder* defense applies to misaligned drawbars, then a pre-injury coupling attempt is a necessary prerequisite to absolute railroad liability. If the failure to align the drawbars prior to coupling constitutes a defense to liability under the Act, then the performance of that procedure obviously cannot give rise to the presumption that the railroad has violated the Act. Instead, only misalignment occurring after a coupling attempt (and consequently after pre-coupling alignment) could give rise to liability, as only such misalignment would support the inference that the equipment was not functioning properly.[13] Absolute liability in a misalignment case, then, would only be triggered by a prior unsuccessful coupling attempt.

Because resolution of our case therefore depends on whether the *Affolder* defense should be extended to misaligned drawbars, we must, however reluctantly, enter that debate. In so doing, we

---

(Cont'd)
Because that testimony seems reasonable in light of his experience, a jury could reasonably have determined that the drawbar was *in fact* so far out of alignment that coupling would not have been possible.

13. Of course, an injured employee could always establish an equipment failure outside the constraints of this framework, but that would amount to an ordinary negligence claim, actionable directly under FELA § 51. As discussed below, Lisek has failed to make out such a claim here.

note that the courts' differing views on this question seem, understandably, to rest largely on their differing answers to the question of whether pre-coupling drawbar misalignment is indicative of an equipment failure or whether it happens as part of the normal operation of nondefective, FSAA-compliant equipment. In light of its conclusion that misalignment in all instances reflects an equipment failure, for example, *Clark's* holding that drawbar misalignment does not come within the *Affolder* exception to absolute liability makes sense. If misalignment reflects a defect, then it is unlike a closed knuckle (which does not), and the *Affolder* exception, meant to preclude railroad liability for compliant equipment, would not be applicable. *Reed's* finding that misalignment does not necessarily reflect a defect, by contrast, supports its conclusion that a misaligned drawbar is indistinguishable from a closed knuckle:

> In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act.

939 F.2d at 132. Thus, under *Reed*, the railroad is not liable (even after a failed coupling attempt) if it can show that the failure resulted from the lack of pre-coupling alignment.[14]

---

14. Although the *Lewis* court was not actually faced with the issue of drawbar misalignment and section 2, it did note that precoupling misalignment was normal and suggested, albeit obliquely, that such misalignment would not therefore give rise to liability:

(Cont'd)

Appendix B

Not only do we view the issue of whether or not nondefective equipment can become misaligned as underlying the courts' divergent holdings on this issue, we are convinced that it provides the only reasonable basis for resolving this question. The purpose of section 2 is to require the use of automatic coupling equipment, and a railroad is liable only for violations of the section. It cannot be liable when it utilizes equipment that complies with the statutory mandate and is not defective. *As Lewis* makes clear, "[t]he predicate for liability under section 2 is the failure to provide equipment that functions as the statute commands." 711 F.2d at 251. If it is normal for nondefective automatic couplers to become misaligned as a part of ordinary railyard operations, then it is simply not reasonable to hold that such misalignment amounts to a violation of the Act. As both the uncontested facts of this case and the findings of other courts indicate, no automatic

---

(Cont'd)

> That the knuckle on the coupler closes or that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is "defective." To be effective the coupling apparatus must permit limited lateral movement of the drawbar in order to allow the cars, when coupled together, to pass around curves without derailment and to allow coupling on a curve. Occasionally, drawbars move so far out of alignment as to preclude automatic coupling. It then becomes necessary to adjust the drawbar or the coupling knuckle, and this may require going between the cars. *Metcalfe v. Atchison, Topeka & Santa Fe Ry.*, 491 F.2d 892, 896 (10th Cir. 1974). After 90 years automatic *realigning* devices, as opposed to automatic *coupling* devices, are still in the experimental stage and have been installed on less than one percent of railroad cars. *Id.* at 896 n.2.

711 F.2d at 235 n.5 (emphasis in original); *see also id.* at 251 n.39.

means for aligning drawbars is commonly available at this time. *See supra* n.2 and accompanying text. We agree with the District of Columbia Circuit that the Congress of 1893 certainly could not have meant to require equipment that is still unavailable 100 years later. 711 F.2d at 251 n.39. As that court explained:

> We shrink from accepting a reading of section 2 that would be tantamount to a pronouncement that 99% of all railroad cars violate section 2—and have done so for the entire 90 years the Act has been in effect.

Id.

In sum, then, whether a prior attempt at coupling is required to trigger the railroad's absolute liability in a misalignment case depends on whether the *Affolder* defense extends to misalignment, and that, in our view, depends on whether nondefective equipment can become misaligned as part of normal railyard operations.[15] Having come that far, our task

---

15. Although neither *Reed* nor *Lewis* addressed the question of whether a prior coupling attempt is necessary to trigger the railroad's absolute liability in a misalignment case, we believe that, because it flows so naturally from the finding that pre-coupling misalignment is normal and that the *Affolder* defense applies to misalignment, both cases assumed this to be true. The above-quoted portion of *Reed*, for example, assumes that coupling will have already been attempted in a misalignment case ("the causative factor *which prevents the coupling* may result from jarring or vibration of the car while moving, or *from human error in failing to . . . align the drawbar* [prior to coupling].") 939 F.2d at 132 (emphasis added). Even more explicit, *Lewis* qualified its finding that misalignment was normal by stating, "[a]t the same time, however, *actual failure* to couple automatically because of a misaligned drawbar . . . is sufficient to establish liability under section 2." 711 F.2d at 251 n. 39 (emphasis in original). The court thus seems to assume that the failed coupling attempt distinguishes actionable from nonactionable misalignment.

becomes quite simple, as it is uncontested for purposes of this case that nondefective coupling mechanisms can, through the normal course of railyard operations, become misaligned to an extent that they will not couple without preliminary realignment. *Clark's* conclusion to the contrary was based on its finding that the normal play of a drawbar is one to one and one-half inches in either direction, which is not enough to preclude automatic coupling. 728 F.2d at 312-13. According to the uncontested facts in our case, however, the car on which Lisek was injured was a "piggyback car," a flat car that is used to provide "trailer on flat car" (TOFC) and "container on flat car" (COFC) service. (R. 41 ¶¶ 10-11, 19-21.) Such cars are longer than standard boxcars and therefore require drawbars having one and one-half *feet* of lateral play. *(Id.* ¶ 18.) Lisek has not disputed the fact that such drawbars can become misaligned to the point of impeding coupling during the normal course of railyard operations and that such misalignment does not reflect any defect in the drawbars. *(Id.* ¶ 22, 33, 35-38.)

According to the undisputed facts, then, the normal operation of nondefective automatic coupling equipment (i.e. equipment that complies with section 2) occasionally requires manual intercar drawbar alignment prior to coupling in order to function. That being so, the mere existence of a misaligned drawbar cannot trigger the railroad's absolute liability in the same way that a failure to couple would. In light of the absence of a failed coupling attempt, we must affirm the district court's dismissal of Lisek's FSAA claim.

III. FELA Claim

45 U.S.C. § 51 provides that railroads operating in interstate commerce:

> shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

The FELA is meant to provide a broad remedial framework for railroad workers and, in light of that purpose, is to be liberally construed in their favor. *Atchison, Topeka & Santa Fe Ry. v. Buell,* 480 U.S. 557, 562 (1987); *Kulavic v. Chicago & Illinois Midland Ry. Co.,* 1 F.3d 507, 512 (7th Cir. 1993). Plaintiffs' burden in a FELA action is therefore significantly lighter than it would be in an ordinary negligence case. In a FELA action, the railroad is liable if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . ." *Harbin v. Burlington N. R.R. Co.,* 921 F.2d 129, 131 (7th Cir. 1990) (quoting *Rogers v. Missouri Pac. R.R. Co.,* 352 U.S. 500, 506 (1957)); *see also Deutsch v. Burlington Northern R.R. Co.,* 983 F.2d 741, 743 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 1845 (1993).

As the Supreme Court made clear in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252-55 (1986), this evidentiary standard must inform our review on summary judgment. *See also, Harbin,* 921 F.2d at 130-31. Specifically, the lightened burden of proof means a correspondingly easier task for a plaintiff defending a summary judgment motion; because his burden at trial is so low, a FELA plaintiff can survive a motion for

summary judgment "when there is even slight evidence of negligence." *Harbin*, 921 F.2d at 131 (citing *Wilson v. Chicago, Milw., St. P., & Pac. R.R. Co.*, 841 F.2d 1347, 1353 (7th Cir.), *cert. dismissed*, 487 U.S. 1244 (1988); *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 820 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987)); *see also Deutsch*, 983 F.2d at 743.

Still, a FELA plaintiff is not impervious to summary judgment. If the plaintiff presents no evidence whatsoever to support the inference of negligence, the railroad's summary judgment motion is properly granted. *See Deutsch*, 983 F.2d at 744. Nor are the Federal Rules of Civil Procedure or the Northern District of Illinois' Local Rules governing summary judgment suspended in a FELA case merely because of the plaintiff's lightened burden as to negligence. Under those rules, summary judgment must be granted if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). And, the party opposing summary judgment:

> may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. R. 56(e). In the Northern District of Illinois, Local Rule 12(n) requires that response to be filed in specified form:[16]

---

16. Rule 12(n) was slightly modified by an amendment that became effective on April 4, 1994. We quote here the pre-amendment rule, effective since June 4, 1990, as that rule was in effect when the district court entered its order granting summary judgment and during the period when all materials relevant to that order were filed.

Appendix B

> Each party opposing a Rule 56 motion shall serve and file . . . a concise response to the movant's statement [of material facts as to which the moving party contends there is no genuine issue]. That response shall contain (1) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon, and (2) a statement, consisting of short numbered paragraphs, of any additional facts which require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon. All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.

Apparently more concerned with his FSAA claim, Lisek's response to N&W's summary judgment motion contains scant reference to his FELA claim.[17] Most significant, his 12(n)

---

17. In his appellate brief, Lisek correctly points out that the last sentence of N&W's summary judgment motion—the sentence containing its prayer for relief—refers only to Count II of Lisek's complaint (which contained his FSAA claim) and fails to mention Count I (containing his FELA claim). (*See* R. 40.) But that apparent typographical error certainly did not obscure the target of N&W's motion. Every other filing connected with that motion — including the notice of filing, the notice of motion, the proof of service, the motion itself, the statement of material facts, and the memorandum of law in support of the motion (which devoted nearly 5 pages to the FELA claim) made clear that the motion was aimed at both

(Cont'd)

statement contains no factual assertions to support the inference that N&W was in some way negligent or that its negligence somehow caused Lisek's accident. *(See* R. 47.) Ordinarily, that flaw alone would suffice to support the grant of summary judgment in favor of N&W on Lisek's FELA claim. *See generally, Waldridge v. American Hoechst Corp.*, No. 92-3714, slip op. at 8-11 (7th Cir. May 16, 1994). As already noted, however, Lisek filed a document entitled "Plaintiff's Response to Defendant's Motion for Summary Judgment on Counts I and II," which contains various factual assertions, in addition to his 12(n) statement. Regarding N&W's purported negligence, the "Response" provides:[18]

> 11. Plaintiff has proved at least one negligent act or omission on the part of the railroad which may have caused, in whole or in part, plaintiff's injury: if the drawbar was slued due to an employee of defendant holding the "pin" up while the car was on a curve, the

---

(Cont'd)
counts. Indeed, Lisek does not appear to have been confused by the error, as his responsive pleading was entitled "Plaintiff's Response to Defendant's Motion for Summary Judgment on Counts I and II," and despite the brevity of his defense of Count II, Lisek did address it in that document. The district court granted the motion as to both counts, and Lisek did not file a subsequent motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment. We are therefore confident that the parties and the court all were clear that N&W's motion was aimed at both counts

18. This document contained Lisek's only attempt to flesh out his FELA claim. His complaint asserted only that N&W had been negligent in failing to provide "safe and suitable tools and equipment to perform the task assigned; . . . a reasonably safe place to work; [and] . . . reasonably safe methods of work." (R. 1, Count ¶ 16.) His memorandum of law in response to N&W's summary judgment motion focuse solely on his FSAA claim.

> employee should not have done this because the drawbar may then become misaligned.
>
> 12. There are sufficient facts for a jury to conclude that the failure to provide a tool for the purposes of aligning a drawbar was negligence on the part of the railroad which contributed in whole or in part to plaintiff's injury.
>
> 13. The Defendant's litany of "innocent" reasons for drawbars to become slued provide sufficient evidence of negligence on the part of defendant.

We need not decide whether this document suffices to meet Lisek's obligations under Rule 12(n), as it in any event creates no factual issue as to N&W's negligence. In support of paragraph 11, Lisek cites the deposition of Steven Csepiga, a switchman with 23 years of experience who works at the Calumet Yard. (R. 42 Ex. E at 7.) In the cited portion, Csepiga testified that the pin should be lifted on straight track, because lifting it on a curve will cause the drawbar to become misaligned. *(Id.* at 65.) The cited testimony, however, sheds no light on whether or not such an error was responsible for the misalignment that resulted in Lisek's injury. The general assertion that lifting a pin while a car is on a curve would be negligent does not shed any light on the issue of negligence on the occasion in question. Lisek has not offered any evidence suggesting that the car was uncoupled on a curve prior to his accident.

In support of paragraph 12, Lisek cites the deposition of Jake Rogers, a switchman who was on Lisek's crew on the day of the

accident. (R. 42 Ex. H at 6-9.) In the cited portion of that deposition, Rogers testified that sometimes, if a drawbar could not be moved by hand, a bar would be required to do so, and that in such a case "[t]he yardmaster . . . calls the car department and they come out and move it." *(Id.* at 20-21.) It is unclear how that fact is at all relevant to the issue of negligence. In any event, this problem clearly was not involved in Lisek's accident, as, if anything, he was thrown off by the ease with which the drawbar moved.

Finally, Lisek's conclusory reference in paragraph 13 to N&W's discussion of factors that may cause drawbar misalignment (the precise referent of which is unclear) also fails to raise a factual question. The paragraph does not specify any particular factor and is unsupported by any factual assertions suggesting that any of the factors might involve negligence.

Because Lisek has therefore failed to offer even a "scintilla" of evidence suggesting that his injury may have resulted from N&W's negligence,[19] the district court was correct to enter summary judgment in favor of N&W on his FELA claim.[20]

---

19. Lisek has attempted to expand on his negligence theory on appeal. He argues for the first time, for example, that the grease he saw on the tie after his fall may have involved negligence and may have been at least partially responsible for the fall. Any facts or argument not offered to the district court when it decided the motion, however, are of course waived. *In re Weber,* No. 93-2766, 1994 U.S. App. LEXIS 10851, at *8 (7th Cir. May 13, 1994).

20. In his final argument on appeal, Lisek challenges the district court's decision to strike an affidavit of Lisek that was filed along with his summary judgment materials. (*See R.* 46.) Because nothing in that affidavit would have changed either the district court's or our own analysis, however, we need not consider the propriety of the court's decision to strike it.

Appendix B

IV. Conclusion

The district court's entry of summary judgment on both Lisek's FSAA claim and his FELA claim was proper. The judgment of the district court is therefore AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, JUNE 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

90 C 6331

Judge George M. Marovich

WALTER F. LISEK,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

On November 8, 1990, Walter F. Lisek ("Lisek"), a switchman for Norfolk and Western Railway Company ("NW"), filed a two-count complaint against NW alleging personal injury sustained on August 5, 1989 while attempting to align a drawbar on train car TTWX978087. Count I alleges that NW failed to provide safe tools, a safe place to work and reasonably safe methods of work in violation of the Federal Employers Liability Act (FELA), 45 U.S.C. § 60. Count II alleges that the drawbar on car TTWX978087 was defective in violation of the Federal

Appendix C

Safety Appliance Act (FSAA), 45 U.S.C. § 2. NW has moved for summary judgment on both counts. For the following reasons, NW's motion is granted.

BACKGROUND

Lisek worked for NW as a switchman. As a switchman, Lisek was required, in part, to check rail cars to be sure they were coupled, to properly align drawbars of rail cars to permit coupling and to give signals to his crew to permit coupling or uncoupling. Lisek and the crew with which he was working on the morning of August 5, 1989 were assigned to couple track 18 in the Norfolk & Western Calumet Yard ("Calumet Yard"). The Calumet Yard is a flat switch yard with a bowl in the middle wherein cars are detached from one train and shoved down a track to roll freely for connection or "coupling" to another car, "string of cars" or train.[1]

Lisek alleges he was hurt when he attempted to center a drawbar on rail car TTWX978087 on track 19.[2] Tracks 18 and 19 run parallel to one another with a distance of more than 20 feet between the two tracks. Although Lisek was assigned to check the cars on track 18, he decided to check both tracks simultaneously in order to save time.

Prior to coupling a track, it is standard operating procedure for a switchman to walk along the track looking for and making adjustments to the automatic coupling equipment. Although

---

1. For an in-depth description of the automatic coupling equipment on rail cars see *Reed v. Philadelphia B. & N. E. R. Co.*, 939 F.2d 128, 129 (3d Cir. 1991).

2. According to Lisek's 12(n) statement of additional facts, "the car identified by defendant as having been identified by plaintiff was 19th in a line of 26 cars in track 19." This car corresponds to TTWX978087.

coupling equipment is designed to operate automatically when the cars impact or strike one another, it will not operate automatically unless at least one of the knuckles is open and the drawbars of the two cars are aligned to the center so the knuckles will meet. There are no devices in widespread use in the railroad industry that automatically align drawbars.[3] Thus, drawbar center realignment is a task performed manually as a routine function of a railroad switchman's job. Checking drawbars and adjusting any that require center alignment normally occurs prior to any attempted coupling or movement of the rail cars.

Lisek's crew had been directed to couple track 18 only. Prior to giving the engineer, George McGee ("McGee"), the signal to back the engine into the cars on track 18, which would cause the cars to roll, knuckles to strike one another and the cars to couple on impact, Lisek began to check the drawbars and knuckles on the cars to make sure the knuckles were open and the drawbars centered. Lisek chose to check the cars on track 19 at the same time to make sure the knuckles were open and the drawbars properly aligned.

While Lisek was checking the cars on track 19, he noticed that the drawbar on car TTWX978087 needed to be centered. As he attempted to move the drawbar on TTWX978087, Lisek alleges that it moved more easily than he expected. Lisek slipped and fell, causing permanent injury. All Lisek's actions occurred before the crew made any attempt to couple tracks 19 or 18. In fact, the engine was sitting stationary on track 18 at the time of the alleged injury.

---

3. Although there is experimental equipment available in the rail industry to automatically center drawbars, this equipment is only being used on one percent of all cars. *United Transp. Union v. Lewis*, 711 F.2d 233, 251 n.39 (D.C. Cir. 1983).

Appendix C

In his deposition, Lisek testified that he did not know the particular cause of his injury. He believes his injury could have been caused by a combination of both the drawbar moving more easily than he expected and grease or some other foreign substance on the tie on which he was standing at the time of the fall.

After Lisek reported the injury to NW personnel, he declined to return to the scene to positively identify the location of the fall. Lisek did, however, identify rail car TTWX978087 as the rail car involved in the accident from the track printout which was shown to him by Trainmaster Dennis Madsen ("Madsen"). After Lisek reported his injury, both the rail car identified by him and the area around the car were inspected by Madsen, Superintendent Dennis Williams, the senior NW supervisor at Calumet, and Assistant Trainmaster John Anna. No exception was taken to the condition of the rail car or automatic coupling equipment.[4] The track was ordered closed by Madsen and a formal inspection of the car was ordered. The car was then inspected by Mechanical Department Car Foreman John Poliszczuk and Carman Alan Heintz. No defects or exceptions were taken by either man. No oil or grease was found on the rail ties under car TTWX978087 or in the immediate vicinity of the car. Although oil was found on Lisek's pants leg, no oil was found on the sole of Lisek's shoe.

DISCUSSION

1. FELA Claim

Liability under the FELA depends on a showing of

---

4. In the rail industry, the term "taking exception" is used to identify a defect in material or equipment or a failure to follow rules or procedures.

negligence on the part of the Railway. *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29 (1944). In paragraph 6 of Count I of Lisek's complaint, he alleges that NW negligently failed to provide safe or suitable tools or equipment; failed to provide a reasonably safe place to work; and failed to provide reasonably safe methods of work. Lisek, however, has failed to produce evidence to support these allegations.[5]

First, NW did not fail to provide Lisek with the necessary tools or equipment. Lisek was attempting to align a drawbar at the time he sustained his injury. In his deposition, Lisek admitted that for the task he was performing at the time of the accident, the only tools required were a good pair of work boots and good clothing. Occasionally, switchmen use either a club — a piece of wood approximately four inches long which is used to provide additional leverage to move a tight drawbar, or a strap which is used when cars are very close together and minute adjustments need to be made. These tools are not normally carried by switchmen but are available upon request.

In this case, Lisek admits that the cars were not close together and, therefore, that a strap was not necessary. He also admits that the drawbar moved more easily than he expected and, thus, there was no need for a club. Since tools were not required for this job (they were not requested or used), there can be no negligence on the part of NW for failure to provide safe and suitable tools.

---

5. In his response to NW's motion for summary judgment, Lisek states: "Sufficient facts likewise exist for a jury to find a violation of the Federal Employers' Liability Act which caused in whole or in part plaintiff's injury." This is Lisek's only reference to his FELA claim. Lisek, however, has failed to identify any specific facts that could support an inference of negligence on the part of NW.

Appendix C

Further, there is no evidence that NW failed to provide reasonably safe work methods. In fact, the evidence supports a finding that it was Lisek's own negligence that led to his injury. Aligning a drawbar requires the switchman to push the drawbar from one side back to the center position. It was a simple task customarily performed by one person.[6] In his deposition, Lisek stated that he placed his left foot inside the rail tie with his right foot behind him on the outside of the rail. His hands were in front of him pushing the coupler. Trainmaster Madsen stated that this position was appropriate and the correct stance for a switchman performing this task.

As Lisek stated, the normal procedure for centering a drawbar was "to get to the side of it — hop it to the middle by giving it a little burst of strength." Since he did not want to move the bar because it was heavy, he "just went in there and attacked it." He slipped and injured himself. Lisek did not look at the ground where he was placing his feet to brace his body weight. Nor did he look at the drawbar to check for additional grease or to test the mobility of the bar before he attempted to realign it. Although it is customary procedure to determine how much force would be necessary to move the drawbar by giving it a small push before attempting to center it, Lisek did not do so in order to save time. Given the evidence and Lisek's own testimony, there is no evidence that NW was negligent by failing to provide reasonably safe work methods.

Finally, Lisek contends that the NW is liable under the FELA for failing to provide a reasonably safe work place. To recover under FELA on the theory that NW failed to provide a safe place

---

6. Lisek claims there was a new NW rule in place at the time of his accident that required two men to perform aligning procedures. Lisek further admits, however, that the customary practice was for only one man to perform these tasks.

to work, Lisek must prove that NW either knew or should have known about the condition which Lisek contends was unreasonably dangerous. *Davis v. Burlington Northern. Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976). The burden of proving NW's negligence is on Lisek. *Kaminsky v. Chicago River & I. R. Co.*, 200 F.2d 1 (7th Cir. 1952).

In his deposition, Lisek testified that after he fell he saw an oil spot on the tie on which he chose to stand. The presence of oil on the rail is not, however, supported by anything other than Lisek's own testimony. Oil was not found on the rail tie under Car TTWX978087 upon inspection by Madsen, Williams and Anna. Madsen also testified that he saw no oil or grease on Lisek's shoes while transporting him to Hammond Clinic. The only grease found was on the knee of Lisek's pants leg.

Even if there was grease on the tie, there is no evidence that NW knew or should have known that the grease was on the ground. There is also no evidence concerning how long the oil had been on the track or where the oil could have come from. Thus, there is no evidence that sufficient time had elapsed since the oil spot was created for NW, in exercising reasonable care, to have learned of and corrected the situation. Similarly, NW had no responsibility for the grease on the drawbar itself.

The fact that the bar moved more easily than Lisek expected is not NW's fault but Lisek's for failing to check the bar before he "attacked" it. Further, Lisek admits that he did not look at where he placed his feet before he shoved the bar. Thus, it is Lisek's own conduct that is the proximate cause of his injuries. For the reasons stated above, we conclude that Lisek has failed to raise any facts that would support a finding of negligence on the part of NW.

Appendix C

2. FSAA Claim

Count II alleges that NW is liable for Lisek's injuries pursuant to section 2 of the FSAA.[7] Section 2 provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars.

In order to impose lability under section 2 of the FSAA, a plaintiff must establish that: 1) the coupling equipment failed to couple upon impact; and 2) the failure of the equipment was a causative factor in plaintiff's injury. *Dobson v. Grand T. W. R. Co.*, 248 F.2d 545 (7th Cir. 1957). In order to prove equipment failure, the plaintiff must show either that the automatic couplers failed to couple upon impact or that the cars failed to remain coupled until intentionally released. *See Carter v. Atlanta & S.A.B.R. Co.*, 338 U.S. 430, 434 (1949) (coupling upon impact); *O'Donnell v. Elgin J. & E. R. Co.*, 338 U.S. 384 (1949). Lisek has failed to meet his burden of proof in this case.

---

7. Congress enacted the FSAA in 1893 in response to concerns of then existing serious safety problems. At that time, there was no conformity in the couplers used among the various operating railroads across the nation. Because there was no conformity, couplers did not automatically couple when the cars from one railroad reached an interchange point and had to be connected to the cars of another railroad. Workers had to go between the rail cars while the cars were moving towards one another to make a manual connection. *See Lewis*, 711 F.2d at 246-47. Section 2 of the FSAA was enacted to avoid this danger by imposing strict liability in the event of a failure of automatic coupling equipment.

Appendix C

At the time of the accident, Lisek was manually aligning the drawbars on the cars and checking whether the knuckles on the cars were open. It is a normal and customary duty of a switchman to align drawbars and open knuckles manually prior to attempting to couple rail cars in switching operations. These preliminary procedures are undertaken to prepare for and increase the chances for a successful coupling. "Procedures taken to increase the efficiency of coupling, to prevent violation and taken before it can be known if a malfunction will occur, are not evidence that equipment is defective." *Lewis,* 711 F.2d at 251 n.39.

Further, there can be no equipment failure as prescribed by section 2 unless there has been an impact which resulted in a failed coupling. There is no evidence, direct or circumstantial, that the coupler Lisek was attempting to realign ever came into contact or "impact" with any other automatic equipment. Further, Lisek was not involved in any intended coupling procedure at the time of the injury. The injury occurred during the preliminary stages of the coupling process. Since impact is an integral part of the proof of equipment failure under section 2 of the FSAA, Lisek's failure to establish an impact is fatal to his claim.

Lisek argues, however, that evidence of a misaligned drawbar is sufficient to impose liability under the FSAA. The cases relied on by Lisek for this proposition, however, are inapposite. In these cases, the switchmen were injured while manually adjusting the coupling mechanism on a rail car after the mechanism had initially failed to couple automatically upon impact. *See e.g. Shuff,* 1993 W.L. 105162; *Clark v. Kentucky & I. T. Railroad,* 728 F.2d 307, 312-13 (6th Cir. 1984) (injured after a failed attempt to couple); *Metcalf v. Atchison. T. & S. F. R. Co.,* 491 F.2d 892 (10th Cir. 1974) (injured during the course of a coupling procedure). This case does not involve an attempted

coupling. There is no evidence from which this court could infer that any attempt to couple car TTWX978081 occurred or that there was impact prior to Lisek's injury. There is also no evidence that there had been an attempted coupling at some other time by some other crew. Therefore, unlike the plaintiffs in *Shuff* and *Clark*, Lisek is unable to show that there was an equipment failure during the time in question. Thus, he has failed to make a prima facie case under section 2 of the FSAA.

The mere fact that the drawbar was "slued" or "off-center" at the time of the accident is not sufficient to establish equipment failure under section 2 of FSAA *unless* an actual failure to couple has occurred due to such drawbar misalignment. *Lewis*, 711 F.2d at 251 n.39. First, drawbars require a certain amount of lateral movement in order to ensure that the cars do not derail on curves. The necessary amount of lateral play is directly proportional to the length of the rail car. The car involved herein, TTWX978087, was an elongated or "piggyback" type car. A piggyback car is designed to hold either semi-tractor trailers or containerized freight. Such cars are generally longer than standard railway box cars. The "normal" play of a drawbar on a standard rail car is one to one and a half inches. *See Shuff v. Consolidated Rail Corp.*, 1393 WL 105162 (N.D. Ill. March 30, 1993). The evidence presented to this court is that the lateral play of the drawbar on TTWX978087 was 18 inches. There is no evidence before this court that this amount of lateral play is evidence that the drawbar was defective in any way.

Second, there are a number of ways in which a drawbar becomes misaligned. A drawbar can become slued during switching operations due to having been switched on a curve. Further, cars can become off center due to vibrations of the rail car while moving over the track. Thus, the fact that the bar was off center is not evidence of equipment failure.

Appendix C

Finally, car TTWX978087 was inspected upon receipt of the car in interchange and it was inspected immediately after Lisek's injury. No exception was taken to the rail car or the condition of the bar or carrier iron. There is no evidence of excess grease on the bar or that NW applied grease to the drawbar between the time the car was received in interchange and the time of Lisek's alleged injury. Furthermore, evidence of grease on the draw bar is not evidence of a defect. Some grease is necessary to avoid rusting and to ensure the lateral play of the bar.

It should also be noted that the mere fact that Lisek was between cars at the time of the incident is also insufficient to establish liability under section 2 of the FSAA. The FSAA is an equipment statute. It requires that rail cars have automatic coupling devices. Section 2 was not intended to prohibit workers from stepping between cars. Lewis, 711 F.2d at 245.

As we have stated, a plaintiff cannot establish a violation of section 2 without proving that equipment failed to perform as prescribed on the day in question. Lisek has failed to present any evidence that would support the inference that the drawbar on car TTWX978087 was defective in any way. Thus, summary judgment in favor of defendants on this count is also appropriate.

CONCLUSION

For the reasons stated above, this court grants NW's motion for summary judgment on both Lisek's FELA and FSAA claims.

ENTER:
s/ George M. Marovich
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: June 29, 1993

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

CASE NUMBER: 90 C 6331

WALTER LISEK

v.

NORFOLK & WESTERN RAILWAY COMPANY

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED *that plaintiff take nothing and judgment is entered in favor of defendant.*

June 28, 1993
Date

H. STUART CUNNINGHAM
Clerk
s/ Frances D. Andrea
(By) Deputy Clerk